

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of)	
)	
)	
Implementation of the)	CC Docket No. 96-115
Telecommunications Act of 1996)	
)	
Telecommunications Carriers' Use of)	
Customer Proprietary Network)	
Information And Other Customer)	
Information)	
)	
Implementation of the Non-Accounting)	CC Docket No. 96-149
Safeguards of Section 271 and 272 of)	
The Communications Act of 1934,)	
As Amended)	
)	

**COMMENTS OF
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises ("ASCENT"),¹ through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules,² hereby submits its comments in response to the *Second Further Notice of Proposed Rulemaking*, FCC 01-247, released September 7, 2001, in the captioned proceedings ("*Second Notice*"). In the *Second Notice*, the Commission

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services. ASCENT is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

² 47 C.F.R. § 1.415.

seeks comment on what methods of customer consent for carrier use and disclosure of “customer proprietary network information” (“CPNI”) would serve the twin governmental interests of protecting consumer privacy and fostering competition, while at the same time providing for informed consumer consent and satisfying the constitutional requirement that any restrictions on speech be narrowly tailored. The Commission also called for comment on, among other additional matters, the interplay between Section 222 and Section 272 of the Act,³ inquiring whether it would have to alter its “fundamental conclusion that [Bell Operating Companies (“BOCs”)] may share CPNI with their 272 affiliates pursuant to Section 222 without regard to the nondiscrimination requirements of Section 272” if it were to adopt an opt-out approach.⁴ ASCENT will address in these comments only the latter issue.

³ 47 U.S.C. § 272.

⁴ Second Notice, FCC 01-247 at ¶ 25.

As recounted by the Commission, it found in its *Second Report and Order* in the captioned proceedings⁵ that Section 272 did “not impose any additional CPNI requirements on BOCs’ sharing of CPNI with their Section 272 affiliates when they share information with their Section 272 affiliates according to the requirements of Section 222.”⁶ Among other reasons cited by the Commission for its determination was its assessment that the nondiscrimination requirements contained in Section 272 “would, in the context of an opt-in approach, ‘pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known and unknown’.”⁷ Given that it might now sanction an opt-out approach, the Commission expressed concern as to associated “competitive and customer privacy ramifications,” noting that while under an opt-in regime, CPNI requirements would “operate to make a carrier’s anti-competitive use of CPNI more difficult by prohibiting carriers from using CPNI unless and until they have obtained affirmative customer approval,” under an opt-out approach a BOC would generally be free to share “its local customers’ CPNI with its long distance affiliate regardless of whether the local customer has chosen the affiliate as his or her long distance provider.”⁸

⁵ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information And Other Customer Information (Second Report and Order), 13 FCC Rcd 8061 (2001).

⁶ Second Notice, FCC 01-247 at ¶ 25.

⁷ Second Notice, FCC 01-247 at ¶ 26.

⁸ Id.

While it concurs that the Commission “should revisit . . . [its] interpretation of the interplay between Sections 222 and 272 if . . . [it] adopt[s] an opt-out approach,”⁹ ASCENT submits that such a reassessment is required regardless of whether the Commission adopts an opt-out or an opt-in approach because the basis for the Commission’s interpretation was erroneous. In removing CPNI from the ambit of Section 272’s non-discrimination requirements, the Commission perceived, and sought to resolve, “an apparent conflict” between Section 222 and Section 272 which simply does not exist. Section 272(c)(1) prohibits a BOC from discriminating between an affiliate and any other entity “in the provision . . . of . . . information,” and Section 272(e)(2) prohibits a BOC from “provid[ing] any . . . information concerning its provision of exchange access to . . . [an] affiliate . . . unless such information . . . [is] made available to other providers of interLATA services . . . on the same terms and conditions.” Section 222(f)(1) defines CPNI as “**information** that relates to the quality, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and . . . **information** contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.” Given that Section 272 does not create an exception for CPNI, CPNI is merely a subset of the information Section 272 requires a BOC to provide on a non-discriminatory basis. Otherwise, the purpose of Section 272 -- *i.e.*, to prevent BOCs from favoring their affiliates -- would be defeated in the context of CPNI.

ASCENT disagrees with the Commission that the “application of the section 272 nondiscrimination requirements” would “severely constrain[] or even negate[]” the “sharing of

⁹ Id.

customer CPNI among those related entities that provide service to the customer.”¹⁰ Certainly this would not be the case in an opt-out regime. Under an opt-out approach, Section 272, as well as Section 222, could be satisfied through transmission of a single notice to customers which provided them with the option of blocking disclosure of their CPNI to both BOC affiliates and unaffiliated competitors. The CPNI of a customer that did not opt-out could be disclosed in full accordance with Section 272. Even in an opt-in regime, however, approval applicable to BOC affiliates and unaffiliated competitors could be readily obtained through the same request mechanism. When BOCs ask customers for the right to access their records, they could inform them that such data would also be made available to other carriers if the customer consent was forthcoming.

¹⁰ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information And Other Customer Information (Second Report and Order), 13 FCC Rcd 8061 at ¶ 158.

The argument that “section 222 should ‘trump’ section 272” because “section 222 specifically governs the use and protection of CPNI, whereas section 272 only refers to ‘information’ generally”¹¹ is a false one. The intent of Congress in enacting Section 272 is clear and there is nothing in either Section 222 or Section 272 that suggests that Congress intended to limit the reach of Section 272's non-discrimination safeguards only to certain forms of information, excluding others such as CPNI. Moreover, as noted above, the goals of Section 222 and Section 272 do not need to be reconciled by effectively rewriting the latter, because the goals of both provisions can be readily achieved by fully enforcing each provision. The “principles of customer convenience and control embodied in section 222”¹² are achieved by empowering the customer, through either an opt-in or opt-out mechanism, to block the disclosure of his or her CPNI, without negating the competitive protections -- which ultimately redound to the benefit of consumers -- contained in Section 272. And the suggestion that BOCs will forgo the sharing of CPNI with their affiliates in order to avoid Section 272 disclosures is farcical.

¹¹ Id. at ¶ 160.

¹² Id.

Nor does the language of Section 222 preclude application of the Section 272 non-discrimination provisions to CPNI. While the Commission has read Section 222(c) to limit sharing “to affiliated entities within the meaning of the exceptions in sections 222(c)(1)(A) and (B),”¹³ this limitation is overcome “with the approval of the customer.”¹⁴ Moreover, Section 222(c)(2) actually compels disclosure of CPNI by a recalcitrant carrier at the direction of a customer, confirming that it was not the intent of Congress to limit CPNI disclosures to related entities in contravention of Section 272's non-discrimination provisions. And the suggestion that customers “cannot knowingly approve release of CPNI unless and until they are made aware of the identity of the party which is to receive the information”¹⁵ is belied by Federal Trade Commission regulations which provide for disclosure of financial information based on descriptive references to categories of potential recipients -- *e.g.*, “mortgage bankers, securities broker-dealers, and insurance agents.”¹⁶

For these reasons, ASCENT urges the Commission to revisit its interpretation of the interplay between Sections 222 and 272, whether or not it moves from an opt-in to an opt-out or a opt-in/opt-out approach. Such an action is not only necessitated by the flaws underlying the Commission’s determination that Section 272 does not impose any additional CPNI requirements on BOCs’ sharing of CPNI with their Section 272 affiliates when they share information with their Section 272 affiliates according to the requirements of Section 222, but by the breadth of the Tenth Circuit’s language vacating the *Second Report and Order*. Whatever may have been the specific

¹³ Id. at ¶ 162.

¹⁴ 47 U.S.C. § 222(c)(1).

¹⁵ Id. at ¶ 163.

¹⁶ 16 C.F.R. § 313.6.

errors identified by the Commission in its decision, the Tenth Circuit expressly vacated not only the entire decision, but all of the regulations adopted therein, rendering all of the Commission's determinations ineffective.¹⁷

Respectfully submitted,

**ASSOCIATION OF COMMUNICATIONS
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¹⁷ U.S. WEST, Inc. v. Federal Communications Commission, 182 F.3d 1224, 1240 (10th Cir. 1999), *cert. denied* 120 S. Ct. 2215 (June 5, 2000).